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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 762

BENJAMIN DRANOW,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered December 16, 1963.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 16, 1963, affirming petitioner's conviction under Title 18, U. S. C., Section 3146. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

1. Whether Rule 23 (a) of the Federal Rules of Criminal Procedure, construed in light of Article 3, Section 2, Clause 3 of the Federal Constitution and the Sixth Amendment to the Federal Constitution, authorizes approval by the trial court of a waiver of jury trial without first making inquiry of the defendant regarding any promises or understandings he might have had with the government, where it appears in the record that the defendant was attempting "to make the best deal he could" for the dismissal of another charge?

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. Rule 23 (a) provides in pertinent part as follows:

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the Court and the consent of the government."

2. Article 3, Section 2, Clause 3 of the Federal Constitution provides in pertinent part as follows:

> "The trial of all crimes except in cases of impeachment, shall be by jury . . ."

3. The Sixth Amendment to the Federal Constitution reads in pertinent part as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

STATEMENT.

Appellant was indicted in one count under Title 18, U. S. C., Section 3146, commonly known as the "bail jumping" statute, for failing to appear on October 16, 1962, in connection with a wire fraud charge (R. 1). The case was tried before the Court, on February 18 and 19, 1963, without a jury; the Court made findings of fact and conclusions of law (R. 141); found appellant guilty, entered a judgment of conviction and sentenced appellant to imprisonment for a term of two and one-half years (R. 140). From the judgment and sentence, appellant appealed to the Eighth Circuit Court of Appeals.

On January 2, 1963, defense counsel moved that the wire fraud indictment (Gov. Exh. 1) be tried before the instant charge for the reason that it had been pending for a long time (R. 30). The Government's principal objection to this motion was that a trial on that charge would consume a great deal of time (R. 31). To meet this objection, defense counsel suggested waiving the jury (R. 33). However, Government counsel was not prepared to do this until it had conferred with the attorneys in the Justice Department who apparently were in charge of the case (R. 34).

After a short recess (during which time appellant's presence was secured) appellant readily agreed to waive a jury in the wire fraud case (R. 39-40). However, repeated questioning by the trial court elicted from him that he would waive a jury in the instant case only if the wire fraud case were first disposed of (R. 40-46). However, Government counsel, in interrogating appellant,

definitely announced that he would not consent to this unless appellant waived a jury in the instant case (R. 42).

In light of these developments court was recessed, and it was suggested that the parties confer during the noon hour (R. 60-62). Counsel and the Court met and an agreement was reached (R. 62). Accordingly, defense counsel announced when court resumed, that appellant had agreed to what had been "suggested" between court and counsel (R. 62). Whereupon government counsel announced that "in order to relieve the defendant's anxiety" it had decided to ask leave to dismiss the wire fraud case, after disposition of the instant case (R. 62-64). At the prompting of the trial court, the government added that it would dismiss the wire fraud case whether or not appellant waived the jury (R. 64). (There is nothing in the record to suggest appellant heard or was aware of this.) After further discussion, defense counsel also abandoned his motion that the wire fraud case be tried first, and its subsequent motion to dismiss the wire fraud case (R. 68). The United States Attorney had a waiver form prepared earlier, which had already been submitted to defense counsel (R. 71). It was indicated that appellant was prepared to waive a jury and he signed the prepared form (R. 25).

The following questions were asked of appellant by Mr. Lord, United States Attorney, before he signed the waiver:

> "Mr. Lord: May I ask you, you understand that you have a right to a jury trial in the bail jumping case?
>
> Defendant Dranow: Yes, I do.
>
> Mr. Lord: You agree that you waive the jury and agree to have this case heard by a judge?
>
> Defendant Dranow: That is correct, with the provision that you do.

Mr. Lord: Without a jury?

Defendant Dranow: Yes, on the provision that you do." (R. 71-72).

The record does not disclose whether the waiver was signed by the Court at that time, but it does disclose it was signed by the Court on the same day (R. 25).

There were no other discussions or proceedings in connection with the jury waiver.

It was contended in the Eighth Circuit that the alleged waiver of jury was ineffective under Rule 23 (a) of the Federal Rules of Criminal Procedure because the trial court did not properly discharge his duty to approve the waiver; it was petitioner's argument that the duty of "approval of the Court" under Rule 23 (a) was one that could not be discharged by the trial court as "a mere matter of rote" (**Patton v. United States**, 281 U. S. 276, 312-313) and therefore required him to make some inquiry of petitioner as to inducements offered in returns for his waiving a jury in the instant case. It was urged that the failure to ask petitioner even one question at the time of waiver meant that the trial court had failed to exercise his duty, at least under the circumstances of this case where previous prolonged questioning of petitioner by the trial court elicited from him a response that he would not waive a jury unless the wire fraud charge were disposed of prior to trial of the instant case (R. 40-46). The Court of Appeals without commenting upon the failure of the trial court to ask any questions of petitioner, held that there was no abuse of discretion on the part of the trial court in approving the waiver (App. 9).

REASONS FOR GRANTING THE WRIT.

1. The Eighth Circuit's approval of the failure of the trial court to make any inquiry regarding the inducements to petitioner's waiver of jury trial, raises serious questions as to the interpretation of Rule 23 (a) of the Federal Rules of Criminal Procedure.

The thrust of petitioner's argument below was that in light of the negotiations before the trial court and the unequivocal refusal of appellant to waive a jury unless there was a satisfactory disposition of the wire fraud charge, it was the duty of the trial court to inquire whether the waiver of jury was induced by the Government's promise to make a disposition of the wire fraud charge satisfactory to petitioner (App. 4). It was contended that the term "approval of the Court" used in Rule 23 (a) of the Federal Rules, in light of **Patton v. United States**, 281 U. S. 276, 312-313, imposed an affirmative duty upon the trial court to inquire into any inducements offered in return for the jury waiver; at least in cases such as this where the trial court had every reason to believe that a "deal" had been made whereby petitioner relinquished his right to trial by jury in return for the Government's dismissing another indictment against him. The Eighth Circuit in rejecting petitioner's contentions stated (App. 8):

> "The defendant has failed to establish that his waiver of jury trial was not made expressly, knowingly and intelligently. The suggestion of waiver of jury came from the defendant. He is a business man of intelligence with considerable trial experience. All of defendant's maneuvers which he here relies upon are attributable to his desire to make the best deal he could for dismissal of the wire fraud case. Both

defendant and his counsel expressed satisfaction with the arrangement made with respect to the wire fraud case. Mr. Lord and Court made it abundantly clear that any agreement with respect to dismissal of the wire fraud case was in no way contingent upon waiving a jury in this case. Before the defendant signed the waiver, he was specifically advised that a jury would be available if desired."

It was contended below that it was self-evident that so important and cherished a right as trial by jury could not be bargained away, i. e., a waiver of jury could not be approved by the trial court if it were induced by promises made by the government. See, **Patton v. United States**, supra; **Adams v. United States**, 126 F. 2d 775, reversed, 317 U. S. 296. However, the foregoing quotation from the Eighth Circuit's opinion seems to say that a waiver may be made "expressly, knowingly and intelligently" although the defendant desired "to make the best deal he could make", at least if he expressed satisfaction with the arrangement, i. e., that a defendant may bargain away his right to a trial provided he receives in return a satisfactory *quid pro quo*.

Whatever the merits of this position, a serious problem in the orderly administration of criminal justice is raised; we think, however, that it would indeed be anomaly for so important a constitutional right to be considered a marketable commodity to be sold if the price is right, and, therefore, the decision of the Eighth Circuit should be carefully scrutinized by this Court.

CONCLUSION.

For the reasons stated hereinabove, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

United States Court of Appeals
For the Eighth Circuit

No. 17,319.

Benjamin Dranow, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the District of Minnesota.

[December 16, 1963.]

Before Van Oosterhout, Matthes and Mehaffy, Circuit Judges.

Van Oosterhout, Circuit Judge.

Defendant Benjamin Dranow was indicted, tried to the court and convicted upon a charge of bail jumping in violation of 18 U. S. C. A., §3146. He was sentenced to a term of two and one-half years, said sentence to be consecutive to previously imposed sentences upon other charges described in **Dranow v. United States**, 8 Cir., 307 F. 2d 545.

The sole error urged by the defendant in this timely appeal is thus stated:

> "The trial court failed to ascertain whether appellant's waiver of a jury was voluntary, and accordingly, the jury was not validly waived under Rule 23 (a) of the Federal Rules of Criminal Procedure and

Article 3, Section 2, Clause 3, and the Sixth Amendment to the Constitution; therefore requiring a new trial."

Unquestionably a criminal defendant is guaranteed the right to a trial by jury by Article III, Section 2, Clause 3 of the Constitution of the United States and the Sixth Amendment to the Constitution. However, it is well-established law that a criminal defendant has a right to waive his constitutional right to a jury trial provided such waiver is voluntarily, knowingly and intelligently made. **Patton v. United States**, 281 U. S. 276; **Adams v. United States**, 317 U. S. 269. With respect to jury waiver, the Court in **Patton** states:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." 281 U. S. 276, 312-13.

In **Adams** the defendant, who had some legal training, refused counsel and without the benefit of counsel waived a jury trial. The Court held: "And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case." The Court goes on to say:

"The **Patton** decision left no room for doubt that a determination of guilt by a court after waiver of jury trial could not be set aside and a new trial ordered except upon a plain showing that such waiver was not freely and intelligently made. If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality. Simply because a result that was insistently invited, namely a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it." 317 U. S. 269, 281.

Rule 23 (a), Fed. R. Crim. P., provides:

"(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

The defendant, his attorney of his own selection and Mr. Lord, the United States Attorney, on January 2, 1963, in open court before Judge Nordbye, each signed a stipulation waiving jury trial, reading:

"Pursuant to Rule 23 (a) of the Federal Rules of Criminal Procedure,

"IT IS HEREBY STIPULATED, between the above parties, by their counsel and by the defendant personally, that the defendant has entered a plea of not guilty to the Indictment herein charging him with a violation of 18 USC 3146; that the defendant fully understands and has been fully advised by his counsel that he has a constitutional right to be tried by a jury, but that with full knowledge of the premises, he

waives trial by jury herein and consents and requests that he be tried by any Federal Judge of the District of Minnesota, the Court consenting, when his case may be called for trial by the United States Attorney for the District of Minnesota or any of his Assistants.

"The United States hereby consents to such waiver."

Such stipulation was filed with the court. Judge Nordbye entered an order thereon reading:

"On the foregoing Stipulation,

"IT IS ORDERED, that the defendant herein may be tried on the Indictment herein by any Federal Judge in the District of Minnesota to whom the case is assigned, without jury, in accordance with the foregoing Stipulation, the Court herewith approving said waiver."

Defendant's basic contention in support of a reversal is thus stated in his brief:

"In light of the history of jury trial, it is self evident that a waiver of jury cannot be valid if it is induced by promise or threats, or if the defendant is incompetent. Yet, the record in this instant case shows that the trial court had every reason to believe that defense counsel and government counsel had consummated a 'deal' whereby the government would dismiss a wire fraud charge pending against defendant in return for defendant's agreement to waive a jury in the instant case. In view of the fact that all negotiations for the 'deal' took place in front of the trial judge (and apparently were engineered by him) it is appellant's position that the trial court committed reversible error in failing to ask even one question of appellant regarding the possibility of his waiver being induced by a promise of the govern

ment; especially when it developed later that perhaps appellant was incompetent to waive a jury."

Such contention is wholly without merit. There is no substance to defendant's conclusion that he was incompetent to waive a jury. At a hearing on a motion for continuance on the ground that defendant was mentally incapable to go to trial, testimony of psychiatrists offered by both the Government and the defendant was received. At the conclusion of such hearing, based upon such testimony and the court's observance of the defendant on a number of occasions, the court entered an extensive memorandum opinion, reviewing the testimony, and determining that the defendant was competent to stand trial.

In the final judgment of conviction, the court again reviewed the question of defendant's competency and found him to be competent. Such findings are supported by substantial evidence. No attack is here made upon the rulings upon the motion for continuance or upon the determination of defendant's competency to stand trial.

The real thrust of defendant's argument is that defendant's waiver of jury trial was coerced by promises that a wire fraud charge (Criminal No. 11) upon which defendant had been indicted would be dismissed if defendant waived a jury upon the charge here involved, and that the defendant was coerced by such promises and that the trial court abused its discretion or committed error in approving defendant's jury waiver. The record completely refutes such a contention.

On the morning of January 2, 1963, a hearing was commenced before Judge Nordbye upon motions pending in this case and the assignment for trial of this case and the wire fraud case. Defendant and his counsel insisted that the wire fraud case be tried first. Counsel stated that he had discussed the matter with the defendant and that

the defendant desired to waive a jury on both the wire fraud and bail jumping charges. Mr. Lord stated that it was necessary for him to consult with the Attorney General's office before taking a position on jury waiver. A recess was taken for the purpose of producing the defendant before the court and to enable Mr. Lord to talk with his superiors. Shortly thereafter court was reconvened by Judge Nordbye with the defendant, his counsel and Mr. Lord present. Defendant was fully advised as to his right to be tried by a jury and upon interrogation stated he fully understood such right and that he desired to waive a jury in both cases. Defendant continued to insist that the wire fraud charge be tried first.

The bail jumping charge involved defendant's failure to appear as directed to answer to the wire fraud charge. Defendant's prior convictions upon related and contemporaneous charges had been affirmed. **Dranow v. United States**, 8 Cir., 307 F. 2d 545. Mr. Lord advised the court and defendant and his counsel in substance that in view of such convictions the Government was not interested in pressing the wire fraud charge, which would be a rather protracted case, but that such indictment was made in good faith and could be supported. Mr. Lord stated he did not wish to dismiss the wire fraud case until after the bail jumping case was tried. He insisted that the bail jumping case be tried at an early date. He stated:

> "Let me explain what the Government's position is. Mr. Dranow, through his attorney and personally, has indicated that he has some defense to the bail jumping charge because the Government never intended to try Criminal 11. I think the record is clear as to what the Government's intentions were when he was ordered to report back here."

After considerable discussion in open court, the understanding arrived at was that the Government upon final

disposition of the bail jumping charge by verdict of guilty or not guilty or by a dismissal would dismiss the wire fraud charge. After consultation with defendant, counsel expressed approval of such arrangement. The record then discloses the following proceedings:

"The Court: Now, then, while Mr. Dranow is here, you and Mr. Cohen may collaborate upon the form with reference to waiver of jury, and if Mr. Dranow wants to sign that, good and well. If it's to be approved by you, good and well. Then after it's approved by you two, if it is, then it is up to me to determine what I will do.

"Mr. Lord: If Your Honor please, could I ask the Clerk whether or not it is possible for him to have a jury here on the 28th in the event Mr. Dranow chooses to proceed with a jury?

"The Clerk: Certainly we can.

"The Court: Certainly. I can speak for the Clerk in that regard.

"Mr. Lord: I have prepared a form, Your Honor, pursuant to the request of counsel earlier this morning at our first hearing, and I have already submitted it to him, and we are prepared to sign it if he chooses to waive a jury.

"Just a moment, please. I take it that Mr. Dranow is prepared to waive the jury in the trial of the bail jumping case?

"Mr. Cohen: That's correct.

"Mr. Lord: Is that your position, Mr. Dranow?

"Defendant Dranow: It is. Is that your position, too?

"Mr. Lord: May I ask you, you understand that you have a right to a jury trial in the bail jumping case?

"Defendant Dranow: Yes, I do.

"Mr. Lord: You agree that you waive the jury and agree to have this case heard by a judge?

"Defendant Dranow: That is correct, with the provision that you do.

"Mr. Lord: Without a jury?

"Defendant Dranow: Yes, on the provision that you do."

The stipulation hereinabove set out was then signed by the defendant, and his attorney and by Mr. Lord and was signed and approved by the court.

The defendant has failed to establish that his waiver of jury trial was not made expressly, knowingly and intelligently. The suggestion of waiver of jury came from the defendant. He is a business man of intelligence with considerable prior criminal trial experience. All of defendant's maneuvers which he here relies upon are attributable to his desire to make the best deal he could for the dismissal of the wire fraud case. Both defendant and his counsel expressed satisfaction with the arrangement made with respect to the wire fraud case. Mr. Lord and the court made it abundantly clear that any agreement with respect to dismissal of the wire fraud case was in no way contingent upon waiving a jury in this case. Before the defendant signed the jury waiver, he was specifically advised that a jury would be available if desired. There is absolutely no support for defendant's contention that his waiver of jury trial was coerced. The record shows that defendant's rights to a jury trial were completely and thoroughly explained to him. The court was justified in accepting the statement of defendant that he fully understood his constitutional rights with respect to jury trial and in accepting his waiver thereof as his voluntary act, intelligently made.

The trial court did not abuse its discretion or commit error in approving the waiver of jury trial requested by

the defendant and approved by the government. The defendant was in all respects treated with utmost fairness; he has had in all respects a fair trial and has failed to demonstrate that any error has been committed in his trial

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

(Filed Dec. 16, 1963, Robert C. Tucker, Clerk.)

United States Court of Appeals
For the Eighth Circuit.

No. 17,319—September Term, 1963.

Benjamin Dranow, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

This Cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered and Adjudged by this Court that the defendant in the said District Court, Benjamin

Dranow, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days after the date of filing of the mandate of this Court in the District Court.

December 16, 1963.

Order entered in accordance with Opinion.

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.